

EXHIBIT 13

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3
4 ELLIOT MCGUCKEN, an)
5 individual,) **CERTIFIED COPY**
6 Plaintiff,)
7 vs.) Civil Action No.:
8 NEWSWEEK, LLC, a New)
9 York Limited Liability)
10 Company; and DOES 1-10,)
11 inclusive,)
12 Defendants.)
13 ----- X
14

15 C O N F I D E N T I A L
16 30(b) (6) ZOOM VIDEOCONFERENCE DEPOSITION OF
17 NEWSWEEK DIGITAL, LLC
18 BY AND THROUGH
19 DIANE RICE
20 NEW JERSEY
21 MARCH 10, 2021

22 ATKINSON-BAKER,
23 a VERITEX COMPANY
24 Telephone: 1-800-288-3376
25 www.depo.com

26 REPORTED BY: Amelinda Lopez, RPR, CCR #30XI00229700
27 FILE NO.: AE08879

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2 SOUTHERN DISTRICT OF NEW YORK
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4 ELLIOT MCGUCKEN, an)
5 individual,)
6 Plaintiff,) Civil Action No.:
7 vs.) 1:19-cv-09617-KPF
8 NEWSWEEK, LLC, a New)
9 York Limited Liability)
10 Company; and DOES 1-10,)
11 inclusive,)
12 Defendants.)
13 -----X

14 Zoom videoconference deposition of DIANE
15 RICE, taken on behalf of the Plaintiff, commencing
16 at 1:00 p.m., Wednesday, March 10, 2021, before
17 Amelinda Lopez, RPR, CCR No. 30XI00229700.

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1 A P P E A R A N C E S:

2

3 FOR PLAINTIFF:

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7 FOR DEFENDANT:

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WITNESS: DIANE RICE

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Examinations

Page

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6	By Ms. Gates	211	
7	By Mr. Burroughs	215	
8	E X H I B I T S		
9	No.	Description	Page
10	1	Amended Deposition Notice	46
11	2	Bates Stamp Newsweek 1 & 2 - Updated Photo Guidelines	75
12	3	Bates Stamp Newsweek 104 & 105 - Photo Guidelines	103
13	4	Bates Stamp McGucken 9 - Newsweek Publication	110
14	5	Bates Stamp Newsweek 5 - Image	161
15	6	Bates Stamp Newsweek 23 - 27 - E-mail String	164
16	7	Bates Stamp Newsweek 3 - E-mail String	173
17	8	Bates Stamp Newsweek 28 - Instagram Message to Mr. McGucken	175
18	9	Screen Capture - Newsweek Terms and Conditions	184
19	10	Bates Stamp Newsweek 157 through 162 - Instagram Platform Policy	191
20	11	Bates Stamp Newsweek 81 through 83 - Full Article	211
21			
22			
23			
24			
25			

1 New Jersey; March 10, 2021; 1:00 p.m.

2 -- -- --

3

4 D I A N E R I C E, having first
5 been duly sworn, testified as follows:

6

7 EXAMINATION

8 BY MR. BURROUGHS:

9 Q. Hello, Ms. Rice. Would you please
10 state your name for the record?

11 A. Diane Rice.

12 Q. Is it R-I-C-E?

13 A. Yes, R-I-C-E.

14 Q. Okay. Are you currently employed?

15 A. Yes.

16 Q. And what's your current employment?

17 A. I'm director of photography for
18 Newsweek.

19 Q. Okay. Do you hold any other
20 employment currently?

21 A. Not currently.

22 Q. Okay. How long have you worked at
23 Newsweek?

24 A. Over three years now.

25 Q. Have you always had that same title,

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1 A. No, they do not.

2 Q. In your tenure there has Newsweek
3 ever employed a photographer?

4 A. Not since I've been with the
5 magazine. We've commissioned photographers,
6 but we don't employ staff photographers.

7 Q. When was the last time you recall
8 Newsweek commissioning a photographer for a
9 Newsweek project?

10 A. That would have probably -- that
11 would have been over the summer, I believe.

12 Q. Okay. And do you recall the
13 substance of that project?

14 A. I think it was in -- I'm sorry,
15 actually, I'm sorry. Let me backtrack. There
16 was a more recent image for someone receiving a
17 medal of the arts that we commissioned. Or
18 rather the photographer came to us and let us
19 know that he was doing -- he was going to be
20 photographing a specific person receiving a
21 medal and we agreed to publish the images.

22 Q. Was that a pitch?

23 A. It was a pitch, yes. And we picked
24 it up prior to the images being shot.

25 Q. Okay. Can you estimate for me what

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1 A. I do not recall having any feedback.

2 Q. Do you recall any feedback from
3 anyone at Newsweek?

4 A. Not specifically.

5 Q. Do you recall anything generally?

6 A. Not generally.

7 Q. Do you recall any feedback that you
8 received from anyone in regard to the
9 guidelines?

10 A. I do not recall any feedback.

11 Q. Okay. From where did you draw in
12 drafting those social media guidelines for
13 Newsweek?

14 A. Industry standards that I knew from
15 my experience as being a photo editor and it
16 would be updated periodically as needed.

17 Q. Okay. So the Newsweek social media
18 guidelines were drawn based on your personal
19 professional experience, correct?

20 A. Correct.

21 Q. Were they based on anything else?

22 A. My experience and from what I know
23 about what kind of things to be aware of within
24 posting images.

25 Q. Okay. And that particular

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1 it's not hosted on our site.

2 Q. Okay. And is that set forth in the
3 guidelines?

4 A. If we don't specify Instagram embeds
5 in the guidelines.

6 Q. Is there any reference to any embeds
7 in the guidelines?

8 A. No.

9 Q. Is there any reference to embedding
10 in any guidelines: the ones you drafted, or any
11 others that you've seen at Newsweek that refer
12 to embedding?

13 A. No.

14 Q. Now, you indicated that your
15 guidelines only required that Newsweek request
16 the right to use third-party content; is that
17 accurate?

18 A. We need permission for third-party
19 content.

20 Q. Okay. So it's not only that
21 Newsweek has to request the consent, it's that
22 they actually have to receive consent?

23 A. Correct.

24 Q. Under your policy, what is the
25 result when Newsweek requests permission but

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1 front of you an exhibit -- well, before we do
2 that. Other than the e-mails that we've
3 already discussed, did you review any other
4 documents in preparation for today's
5 deposition?

6 A. Not specific to this case, no.

7 Q. What did you review generally?

8 A. I generally reviewed the
9 correspondence that I had in relation to this
10 story.

11 Q. Okay. So aside from the
12 correspondence, did you review anything else,
13 any other documents or evidence to prepare
14 yourself for today?

15 A. I read the terms of service for
16 LinkedIn -- oh, I'm sorry, Instagram.

17 Q. Was that the first time you had read
18 those?

19 A. I've reviewed them in the past.

20 Q. When do you recall was the first
21 time that you had reviewed those?

22 A. I couldn't recall exactly.

23 Q. Would it have been within the last
24 six months?

25 A. Most likely, yes.

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1 the U.K. versus the U.S. relating to the use of
2 third-party content?

3 MS. WOLFF: Objection.

4 A. Sorry, you were breaking up on that
5 question.

6 Q. Okay. Is there anything in your
7 social media guidelines or Newsweek's policies
8 in general that addresses any differences
9 between the legal ramifications of using
10 third-party content in the U.S. versus the
11 U.K.?

12 A. We have the same guidelines for
13 both, both offices.

14 Q. Okay. So Newsweek did not have the
15 artist's consent to post the photograph we're
16 looking at here on Exhibit 4, correct?

17 MS. WOLFF: Objection.

18 A. He did not -- he did not
19 specifically give us permission to include the
20 link.

21 Q. Okay. And did Newsweek have any
22 conversations or communications with
23 Mr. McGucken whereby he gave any sort of
24 consent for the use?

25 MS. WOLFF: Objection.

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1 answer my question. I understand these answers
2 and what you're testifying to, but they're
3 simply not responsive to the question. So
4 please listen closely to the question and try
5 to answer the question I'm asking you. Okay?

6 A. Okay.

7 Q. So after not receiving a response
8 from Mr. McGucken relating to the use of this
9 photography, Newsweek, notwithstanding that
10 lack of response, displayed the photography
11 anyway, correct?

12 MS. WOLFF: Objection.

13 A. Correct.

14 Q. Okay. And is it a practice of
15 Newsweek to do that, to reach out for consent
16 from photographers, and if they decline
17 consent, Newsweek uses the content anyway?

18 MS. WOLFF: Objection.

19 A. If a photographer declines or tells
20 us explicitly they don't want us to use their
21 content, we are unlikely to use it.

22 Q. But if they do not respond, is it
23 Newsweek's practice to use the material that
24 they sought consent for notwithstanding the
25 fact there was no response?

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1 Q. First and foremost, just one more
2 time. In situations where Newsweek reaches out
3 to the photographer to request consent to use
4 their work, and the photographer does not
5 respond, is it Newsweek's practice to use that
6 material anyway through the embedding process?

7 MS. WOLFF: Objection.

8 A. It's possible we would do that.

9 Q. Okay. And doing so would not
10 violate Newsweek's social media guidelines,
11 correct?

12 A. Embedding images does not violate
13 the guidelines that I had written out.

14 Q. Okay. And that's the case even if
15 the photographer declines a request for consent
16 or doesn't respond to a request for consent,
17 correct?

18 MS. WOLFF: Objection.

19 A. Declining and not responding aren't
20 the same thing.

21 Q. So is it your testimony that if the
22 photographer does not respond to a request for
23 consent, Newsweek takes that as consent to use
24 the work on its website?

25 MS. WOLFF: Objection.

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1 A. We would embed -- we embed images.
2 Q. So it's Newsweek's business practice
3 when it is unable to obtain consent to simply
4 embed the image at issue; is that correct?

5 MS. WOLFF: Objection.

6 A. If the image is newsworthy and in
7 relation to the story, embedding images is
8 allowed as per our practice.

9 Q. And your practice at Newsweek is to
10 do so even when you've directly contacted the
11 photographer and they did not respond providing
12 consent, correct?

13 MS. WOLFF: Objection. Asked and
14 answered.

15 A. No permission is required when it
16 comes to embedding images.

17 Q. And that's your position
18 irrespective of whether you've asked for
19 consent or received consent, correct?

20 MS. WOLFF: Objection.

21 A. I'm sorry. Can you repeat the
22 question?

23 Q. Okay. Your position is that --
24 well, strike that.

25 Is it Newsweek's practice to use

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1 MS. WOLFF: Objection.

2 A. We asked for permission to host the
3 image. We did not hear back, so we did not
4 host the image in our site; therefore, we
5 included a link. They are two different
6 questions.

7 Q. Well, when you include a link, are
8 you displaying the Instagram content?

9 A. Correct.

10 MS. WOLFF: Objection. That calls
11 for a legal conclusion.

12 MR. BURROUGHS: Madam Court
13 Reporter, did you get the answer?

14 THE REPORTER: Yes.

15 BY MR. BURROUGHS:

16 Q. Okay. So here you are displaying
17 McGucken's photograph on Newsweek, correct?

18 MS. WOLFF: Objection. Legal
19 conclusion.

20 BY MR. BURROUGHS:

21 Q. Do you understand the question? I'm
22 happy to rephrase it.

23 A. Please rephrase.

24 Q. Sure. Did Newsweek display
25 Mr. McGucken's photograph?

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1 MS. WOLFF: Objection.

2 A. It was visible on our website, yes.

3 Q. Okay. What's your definition of
4 display?

5 MS. WOLFF: Objection.

6 A. There's multiple definitions of
7 display.

8 Q. Okay. Can you give me yours based
9 on your industry experience?

10 A. What you can see.

11 Q. Okay. So per your definition, is it
12 possible for you to see McGucken's photograph
13 on the Newsweek website?

14 MS. WOLFF: Objection.

15 A. You can see it on our website, yes.

16 Q. Okay. So then it is fair to say
17 that the Newsweek website displayed Mr.
18 McGucken's photograph, correct?

19 MS. WOLFF: Objection.

20 A. Yes.

21 Q. Okay. And Newsweek displayed
22 Mr. McGucken's photograph despite the fact that
23 he had never affirmatively consented to that
24 display, correct?

25 MS. WOLFF: Objection.

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1 embed.

2 Q. Would that be the embed of
3 Mr. McGucken's photograph?

4 A. Most likely, yes.

5 Q. Okay. So is it fair to say that
6 Newsweek removed Mr. McGucken's photograph from
7 Newsweek's website no earlier than January 21,
8 2020?

9 A. Yes.

10 MR. BURROUGHS: All right. Ms.
11 Zaharia, what exhibit was this? Okay. So mark
12 this as Exhibit 7?

13 BY MR. BURROUGHS:

14 Q. And I'm next going to direct your
15 attention to Exhibit 8, which is going to be
16 Newsweek 23 to 27.

17 Oh, I apologize. We've actually
18 already marked this as Exhibit 26 -- I'm sorry,
19 it's Exhibit 6, I believe. Is that correct,
20 Ms. Zaharia? Okay.

21 So there is an indication -- we have
22 to scroll through it; this is one of the
23 difficulties of Zoom depositions -- that this
24 article may have been pitched by a Newsweek
25 editor. Do you see that in the e-mail?

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1 newsworthy.

2 Q. Okay. So in your estimation,
3 weather is newsworthy?

4 A. Yes.

5 Q. Okay. And why is that?

6 MS. WOLFF: Objection.

7 A. Because --

8 MS. WOLFF: You can answer.

9 A. I mean, if it affects people.

10 Q. Okay. So it sounds to me like
11 you're saying anytime a story affects people,
12 it's newsworthy enough to use an artist's work
13 without consent. Is that accurate?

14 MS. WOLFF: Objection.

15 A. I think you're putting words in my
16 mouth.

17 Q. Oh, please can you explain to me a
18 little bit more about why you think that this
19 particular photograph is newsworthy?

20 A. It's an unusual occurrence.

21 Q. Okay. Anything else? From where
22 did you learn your definition of the phrase
23 "newsworthy" as you're using it today?

24 MS. WOLFF: Objection.

25 A. I couldn't say exactly. I've been

1 in the industry a long time.

2 Q. Okay. Let's say hypothetically
3 that, you know, I was in the news because I won
4 a Grammy award. In such a circumstance, do you
5 feel that using a photograph of me would be
6 newsworthy?

7 MS. WOLFF: Objection.

8 A. Yes.

9 Q. Okay. And is it fair to say that
10 you're using or Newsweek is -- let me withdraw
11 the question.

12 Is Newsweek using McGucken's
13 photograph to illustrate this story about the
14 weather in Death Valley?

15 MS. WOLFF: Objection.

16 A. I mean, it's included as part of the
17 story to illustrate what was seen.

18 Q. Okay. For what other purposes is it
19 being included, if any?

20 A. It's informative.

21 Q. Okay. In what sense?

22 A. It shows the lake that was described
23 in the story.

24 Q. Okay. So is it fair to say that the
25 sole reason to use McGucken's photograph is to

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1 Okay. When Newsweek distributed this
2 article to its viewers, did it distribute the
3 entirety of the McGucken photograph?

4 MS. WOLFF: Objection.

5 A. I'm not sure what you mean. Like if
6 it was visible on Facebook, the only thing you
7 would see would actually be the Getty image and
8 then you wouldn't see the full story until you
9 click on it.

10 Q. Okay. So when Newsweek distributed
11 this particular article, the one that
12 incorporates the McGucken photograph to
13 viewers, the viewers would see the entirety of
14 the McGucken photograph. Is that accurate?

15 MS. WOLFF: Objection.

16 A. If they clicked on the story, they
17 would see it.

18 Q. Okay. And the version they would
19 see, would that be modified or altered at all?

20 MS. WOLFF: Objection.

21 A. Not that I'm aware of.

22 Q. Okay. Would it appear to the viewer
23 of the Newsweek site exactly as it appears on
24 Mr. McGucken's Instagram?

25 A. It would.

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1 Mr. McGucken's photograph, as published on your
2 website, fits within the user content
3 definition in paragraph 16, correct?

4 MS. WOLFF: Objection.

5 A. I don't know if there's an earlier
6 definition for user content in the site, but
7 images posted to Instagram, I believe, this is
8 referring to as user content.

9 Q. Okay. And we're in agreement that
10 Newsweek displayed that user content in the
11 form of the McGucken photograph, correct?

12 MS. WOLFF: Objection.

13 A. I believe I've answered this
14 question multiple times.

15 Q. Okay. So, correct?

16 A. The image was visible on our
17 website, yes, via an Instagram link.

18 Q. Okay. And before displaying Mr.
19 McGucken's user content on Newsweek.com, you
20 did not obtain the prior permission of
21 Instagram, correct?

22 MS. WOLFF: Objection.

23 A. I'm not sure how that's relevant.

24 Q. Did you obtain the permission or
25 not?

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1 MS. WOLFF: Objection.

2 A. We did not communicate with
3 Instagram regarding this image.

4 Q. Okay. Have you ever had -- has --
5 withdraw the question.

6 Has Newsweek had any communications
7 with Instagram or Facebook relating to this
8 image?

9 A. Not to my knowledge.

10 Q. Has Newsweek had any communications
11 with Instagram or Facebook relating to the
12 publication of user content from those
13 platforms?

14 A. Not that I'm aware of it.

15 Q. Okay. So it sounds like we're in
16 agreement that there was no outreach by
17 Newsweek to Instagram in connection with the
18 McGucken photograph that would in any way
19 relate to paragraph 16, correct?

20 MS. WOLFF: Objection.

21 BY MR. BURROUGHS:

22 Q. Is that correct?

23 A. I'm sorry, I didn't realize that was
24 a question.

25 Q. Looking at paragraph 16, it's

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1 A. No.

2 Q. Okay. Did Instagram or Facebook
3 ever advise you specifically that you had the
4 right to publish Mr. McGucken's content on your
5 website?

6 MS. WOLFF: Objection.

7 A. As I've stated before, we have not
8 communicated directly with the platform.

9 Q. Okay. Has the platform communicated
10 with you in any way to indicate to you that
11 they grant to you a sublicense to use
12 McGucken's work on your website?

13 MS. WOLFF: Objection.

14 A. We haven't specifically spoken with
15 the platform.

16 Q. Okay. Give me one moment to go over
17 my notes here. I think we're just about done.

18 One more question. Does Newsweek keep
19 copies of its archived posts?

20 A. Define what you mean by posts.

21 Q. Articles.

22 A. I mean, stories stay on the website;
23 they don't come down.

24 Q. Okay. To the extent that --
25 withdrawn.

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1 STATE OF _____)
2 COUNTY OF _____) ss.
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4
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6

7 I, the undersigned, declare under penalty of
8 perjury that I have read the foregoing transcript,
9 and I have made any corrections, additions, or
10 deletions that I was desirous of making; that the
11 foregoing is a true and correct transcript of my
12 testimony contained therein.

13 EXECUTED this _____ day of _____,
14 20_____, at _____.

15 (City) (State)
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22 Diane Rice
23
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C E R T I F I C A T I O N

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5 I, AMELINDA LOPEZ, a Certified Court
6 Reporter, Registered Professional Reporter, and
7 Notary Public of the State of New Jersey, certify
8 that the foregoing is a true and accurate
9 transcript of the testimony at the time and the
10 date hereinbefore set forth.

11 I further certify that I am neither attorney
12 nor counsel for, nor related to or employed by any
13 of the parties to the action in which the testimony
14 was taken; and further that I am not a relative or
15 employee of any attorney or counsel employed by the
16 parties hereto, nor am I financially interested in
17 the action.

18

Signature reserved.

19

Dated this 23rd day of March, 2021.

30

21

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Certified Court Reporter & Notary Public
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